to the period within which to file the memorandum of appeal.

Order 55 r 2(1) of the RHC specifically deals with the memorandum of appeal. The memorandum must be in Form 113A found in the list of forms in the RHC. The memorandum must be filed in the High Court in duplicate. The period stated by this rule within which the memorandum of appeal is to be filed, is 14 days from the service of Form 141 by the subordinate courts on the appellant or his counsel. To hold that six weeks should be the period within which to file the memorandum of appeal in a case where the appellant is represented by counsel would lead to absurdity because even an unrepresented appellant is given only 14 days from the service of Form 141 to file his memorandum of appeal to the High Court.

In the appeal before me, the appellant is 20 days out of time when he filed his memorandum of appeal. He has not made an application supported by affidavit giving reasons why he had not, or could not file the memorandum within the period of 14 days after the service on him of the notes of evidence on 6 February 1990. The grounds of judgment had been served on him earlier, on 13 December 1989.

Order 55 r 4(3) of the RHC states that where a memorandum of appeal is not filed within the prescribed time, and no sufficient ground is shown for the delay, the appeal must be dismissed.

For the reasons stated, I dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *Nadarajah & Partners; KC Lim & Co.*

Reported by *Wong Kim Fatt*

Ong Lai Kim v Public Prosecutor and other appeals

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 52-40-87, 52-41-87 AND 52-39-87
ZAKARIA YATIM J
30 MARCH 1991

Criminal Procedure — Identification parade — Use of one-way mirror

Criminal Procedure — Sentencing — Rape — Robbery — Deterrent sentence for first offenders — Offence of violence — Occurrence of offence rampant — Public interest

Criminal Procedure — Sentencing — Punishment of light rotan for an adult offender — Whether appropriate — Criminal Procedure Code (FMS Cap 6), ss 173 & 288

Evidence — Age of accused — Determination for the purpose of sentence — Age set out only in probation and charge sheet — Evidence Act 1950, s 114

The three appellants were tried and convicted of rape and robbery. During their trial, they objected to the procedure of their identification as the parade was conducted with the victim standing behind a one-way mirror. The objection was rejected. The first appellant was sentenced to ten years' imprisonment and ten strokes of the light rotan in respect of the rape; eight years' imprisonment and four strokes of the light rotan for the robbery. The second appellant was sentenced to 15 years' imprisonment and ten strokes of whipping for the rape; eight years' imprisonment and four strokes whipping in respect of the robbery. The third appellant was sentenced to 15 years' imprisonment and ten strokes of whipping. They appealed against conviction and sentence.

Held, dismissing the appeal:

(1) There was no specific provision in the Criminal Procedure Code ('CPC') or the Evidence Act 1950 regarding the procedure for identification parades. In the absence of such a provision, the English procedure was applicable and this allowed for the use of a one-way mirror. Therefore the use of a one-way mirror to identify the three appellants was proper.

(2) It was also not improper for the victim to be shown pictures of suspects to see if she could identify her assailants.

(3) The sentence of ten strokes of the light rotan against the first appellant was not appropriate as he was already an adult. His age could be determined from the probation report and the charge sheet. The sentence was therefore substituted with whipping.

(4) The sentences were not manifestly excessive. The offence of rape was rampant. The court would be failing in its duty if it did not impose a deterrent sentence in this case. The appellants are no doubt first offenders, but as they have been convicted of serious crimes involving violence, the primary consideration of the court was the element of public interest.

[Bahasa Malaysia summary

Tiga perayu telah menjalani perbicaraan dan disabit dengan rogol dan perompakan. Semasa perbicaraan mereka, mereka membantah kepada prosedur pengenalan mereka kerana perbarisan cam telah dikendalikan dengan mangsa berdiri di belakang sebuah cermin sehala. bantahan telah ditolak. perayu pertama telah dihukum sepuluh tahun penjara dan sepuluh

pukulan rotan ringan berkenaan dengan rogol; lapan tahun penjara dan empat pukulan rotan ringan bagi perompakan. Perayu kedua telah dihukum 15 tahun penjara danempat pukulan sebat bagi rogol dan empat pukulan sebat berkenaan dengan perompakan. Perayu ketiga telah dihukum 15 tahun penjara dan epuluh pukulan sebat. mereka merayu terhadap sabitan dan hukuman.

Diputuskan, menolak rayuan itu:

(1) Tidak ada peruntukan tertentu dalam kanun Acara Jenayah ('KAJ') atau Akta Keterangan 1950 mengenai prosedur bagi perbarisan cam. Tanpa peruntukan sedemikian, prosedur Inggeris adalah terpakai dan ini membenarkan kegunaan sebuah cermin sehala. Justeru itu, kegunaan sebuah cermin sehala bagi mencam tiga perayu itu adalah wajar.

(2) Adalah juga bukan tidak wajar bagi mangsa ditunjukkan gambar-gambar orang-orang yang disyaki untuk menuntukan sama ada dia boleh mengenalpasti penyerang-penyerangnya.

(3) Hukuman sebanyak sepuluh pukulan rotan ringan terhadap perayu pertama tidaklah sesuai kerana dia telah menjadi seorang dewasa. Umurnya boleh ditentukan daripada laporan akhlak dan kertas tuduhan. jadi hukuman itu diganti dengan sebat.

(4) Hukuman-hukuman tidaklah melampaui batas. kesalahan rogol telah merebak. mahkamah akan gagal dalam tugasnya jika ia tidak mengenakan hukuman yang mencegah (deterrent) dalam kes ini. Walaupun perayu adalah pesalah kali pertama, tetapi oleh kerana mereka telah disabit dengan jenayah yang serius melibatkan keganasan, pertimbangan mahkamah yang utama adalah unsur kepentingan awam.]

Cases referred to

1 *Chan Sin* v *PP* [1949] MLJ 106 (folld)
2 *R* v *Roberts* [1982] 1 All ER 609 (folld)
3 *Goh Chung Wee* v *PP* (FT Criminal Appeal No CR 52-60-87) (unreported) (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 173, 288, 316, 325
Evidence Act 1950 s 114
Penal Code (FMS Cap 45) ss 376, 392

Harpal Singh Grewal (*S Thayaparan* with him) for the first and second appellants.
T Gunaseelan for the third appellant.
KK Wang (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Zakaria Yatim J: The three appellants were tried jointly in the sessions court for offences of rape and robbery under ss 376 and 392 of the Penal Code (FMS Cap 45) ('PC') respectively. There were separate charges against each of the appellants. The first charge against the first appellant was that on 23 April 1986, between 12.30am and 1.30am at an unused mining area at Kepong in the City of Kuala Lumpur, he raped a lady aged 27 years (hereinafter the lady is referred to as 'Miss X') and thereby committed an offence punishable under s 376 of the PC. The second charge against the first appellant was that on the same date and at about the same time, and at the same place, he jointly with three others robbed Mss X of her car, her gold necklace, two bracelets, a Gucci watch, a ring and an anklet worth $30,500 and thereby committed an offence under s 392 of the PC. The second and third appellants also faced similar charges separately.

The learned president found the three appellants guilty of the rape charge and the first and second appellants guilty of the robbery charge. They were convicted. The first appellant was sentenced to ten years' imprisonment with effect from the date of arrest and ten strokes of light rotan in respect of the rape charge; eight years' imprisonment with effect from the date of arrest and four strokes of light rotan in respect of the robbery charge. The second appellant was sentenced to 15 years' imprisonment with effect from the date of arrest and ten strokes of whipping in respect of the rape charge; eight years' imprisonment with effect from the date of arrest and four strokes of whipping in respect of the robbery charge. The third appellant was sentenced to 15 years' imprisonment with effect from the date of arrest and ten strokes of whipping in respect of the rape charge; he was acquitted and discharged in respect of the robbery charge. The appellants appeal against conviction and sentence.

The facts of the case are that on 22 April 1986 at about 9.30pm Miss X went for a business dinner at the Hotel Equatorial. She went there in her car. The dinner ended close to midnight and she left Hotel Equatorial for home in her car. At about 12.30am on 23 April 1986 she was travelling along Jalan Maarof. When she arrived at the end of Jalan Maarof and was going towards Jalan Damansara, a car knocked into the rear of her car. Her car was moving at that time. When the car knocked into the rear of her car, her car jerked and she stopped. She got down to examine the damage done to her car. When she got out of her car, three male persons from the other car came out and pretended to see whether there was anything wrong with Miss X's car. She saw no major damage to her car and decided to get into her car. When she was about to get into her car, the three male persons grabbed hold of her. She screamed and put up a struggle. One of them held her by the neck and another held her arm. They overpowered her and pushed her into the rear seat of her car. One of them drove her car. The other car followed. They took her to a disused mining pool. They stopped the car and asked Miss X to get out. They then asked her for money but when she said she did not have any money they took away all her jewellery and her watch. Then they waited for the others in the other car to join them. Later these male persons, viz the first, second and third appellants and another person raped her. After raping her, the appellants and their friends drove away from the disused mining pool. Miss X was made to sit at the back seat of her car. When they reached a palm oil estate they opened the door of Miss

X's car and pushed her out of the car. With the help of the guard from the estate she went to Bukit Traverse Police Station and lodged a report.

The learned president, in her grounds of judgment, stated that from the evidence before her she was satisfied that the ingredients under s 376 had been proved, namely, that there was sexual intercourse between each of the appellants and Miss X; that there was penetration in every intercourse and that the intercourse was without the consent of Miss X. The learned president also stated that from the evidence before her the prosecution had proved all the ingredients under s 392 of the PC, namely, that the first and second appellants committed theft; that they caused wrongful restraint to Miss X; that they did so in committing the theft and that they did so voluntarily.

From the evidence I find that the prosecution had made out a prima facie case against all the appellants in respect of all the charges against the appellants except the charge of robbery against the third appellant. In her grounds of judgment the president gave her reasons, based on the evidence, why the prosecution had made out a prima facie case against the appellants. She admitted however that she made a mistake in not acquitting and discharging the third appellant at the close of the case for the prosecution in respect of the robbery charge. In any event the third appellant was acquitted at the end of the case for the defence in respect of that charge. In my view no miscarriage of justice was done to the third appellant.

At the hearing of the appeal, the appellants relied on several grounds of appeal. The first main ground of appeal was that the learned president erred in law and in fact in deciding that the use of one-way mirror in identification parade was valid and proper. According to the appellants, such method had not been known, recognized, practised or accepted in any court in this country.

According to the evidence in this case, the three appellants were identified by Miss X at three separate identification parades and the appellants were identified by Miss X from an adjoining room through a one-way mirror.

The identification parades were described by Insp Amidon bin Adnan who held the parades at the request of the investigation officer, Insp Siti Azzah. In his evidence, Insp Amidon said that on the morning of 23 July 1986 he proceeded to hold the first identification parade in respect of the third appellant at Sentul Police Station. The third appellant was kept in the lock-up at Jalan Bandar police station before he was taken to Sentul Police Station. Miss X was in the OCPD's office at the Sentul Police Station. Insp Amidon gathered nine persons to participate in the parade. They were of about the same age, same race and almost similar in build and height as the third appellant. The third appellant was about twenty years old. These nine persons were assembled in a room in a building separate from the OCPD'S office. They were standing in a straight line. Insp Amidon had earlier tied strings across the room with numbers from one to ten above their heads. On each number he marked an arrow pointing downwards to the heads of the participants. After the nine participants had assembled in the room, he brought in the third appellant. He explained to him the purpose of the parade and that the identification would be done through a one-way mirror. He asked the third appellant whether he objected to any of the participants or to the arrangement and the third appellant replied 'no'. He also asked whether the third appellant wished to change his clothes or comb his hair and he replied 'no'. He then asked the third appellant to choose his position in the parade and he chose the position between numbers two and three.

Insp Amidon then left the room. When he left the room he instructed a police personnel to look after the room. Insp Amidon then went to an adjoining room. A woman constable brought Miss X to the adjoining room. The woman constable then left, leaving Insp Amidon and Miss X in the adjoining room. He then told Miss X the purpose of her presence there and explained to her that the identification parade would be conducted through a one-way mirror. He then asked her to verify the person who raped and robbed her through the one-way mirror by indicating the number immediately above his head. When Miss X entered the room the mirror was covered with a curtain. He drew the curtain when he asked Miss X to identify the person. After looking through the mirror for about two to three minutes, Miss X said, 'No 3 ... He was the only one who raped me.' She nearly broke down. Insp Amidon then sent her back to the OCPD's room, escorted by a woman constable. He then dismissed the parade and sent the person identified away from the room.

On the same day at about 4.00pm he conducted a second identification parade at the same place. The same procedure was adopted. At this parade, Miss X identified the second appellant through the one-way mirror as the person who raped and robbed her.

On 17 August 1986 Insp Amidon conducted a third identification parade at the same place. The same procedure was adopted. At this parade, Miss X identified the first appellant as the person who raped and robbed her.

The question for the court to consider is whether the identification of a suspect standing at an identification parade by a victim of rape and robbery by looking through a one-way mirror is a valid and proper identification.

There is no specific provision in our Criminal Procedure Code (FMS Cap 6) ('the CPC') or in the Evidence Act 1950 regarding the procedure for identification parades. Reference was made in the old s 113(111) of the CPC to a statement made in the course of an identification parade. But the whole of s 113 was substituted by a new s 113, vide Act A324 which came into effect on 10 January 1976. The present s 113 makes no reference to identification parades.

The practice of holding a proper identification parade in this country has been summarized in *Mallal's Criminal Procedure* (4th Ed) at p 155. But the practice does not include an identification parade by way of a one-way mirror.

In England, it is proper to hold an identification parade to identify a suspect by using a one-way mirror. *Archbold's Criminal Pleading and Practice* (43rd Ed) states at p 1148 as follows:

> A parade may take place either in a normal room or in one equipped with a screen permitting witnesses to see members of the parade without being seen ... The procedures for the composition and conduct of the parade are the same in both cases, subject to para 7 below (except that a parade involving a screen may take place only when the suspect's solicitor, friend or appropriate adult is present or the parade is recorded on video) ... Once the parade has been formed, everything afterwards in respect of it shall take place in the presence and hearing of the suspect and of any interpreter, solicitor, friend or appropriate adult who is present (unless the parade involves a screen, in which case everything said to or by any witness at the place where the parade is held must be said in the hearing and presence of the suspect's solicitor, friend or appropriate adult or be recorded on video).

Since there is no express provision in our law relating to the procedure for holding an identification parade by using a one-way mirror, the English procedure as stated in the passage quoted above is applicable to the present case by virtue of s 5 of the CPC. Therefore, the use of the one-way mirror to identify the three appellants was proper in the present case. According to the English procedure, an identification parade involving the use of the one-way mirror may only be held in the presence of the suspect's solicitor, friend or an appropriate adult.

In the present case no solicitors were present when the identification parades were held. There is no evidence that the appellants had retained counsel when the identification parades were held. Indeed the second and third appellants were not even represented by counsel at the trial. There is no evidence to show that the police had denied the appellants to have their friends or solicitors present. The appellants just had no solicitors at the time when the identification parades were held. But the identification parades must be held to complete the police investigation.

From the evidence, the police had to adopt the one-way mirror procedure to hold the identification parades, because Miss X was too scared to face her assailants. Insp Leong Li Leng, in her evidence said:

> The complainant was not willing to attend an identification parade. She informed me that she did not want to see again the suspects personally as she's too scared to do so ...

It was for that reason that the police decided to adopt the one-way mirror procedure. I think the police was justified in making such a decision.

There were ten participants, including the suspect, taking part in the identification parade. As stated earlier the participants were of about the same age, the same race and almost similar in build and height as the appellants. The appellants were asked to choose their positions in the respective parades. The learned president, in her grounds of judgment, stated that she was satisfied 'the the identification parade was conducted fairly and regularly'. I agree with her finding. See *Chan Sin* v *PP*[1] at p 108.

Before the appellants were arrested, Insp Siti Azzah showed Miss X some photographs of suspects believed to be involved in the alleged rape and robbery. This issue was raised by the appellants at the hearing of the appeal. The learned deputy public prosecutor ('DPP') submitted that it was not irregular for the police to show Miss X the photographs. I agree with the learned DPP. *Sarkar's Law of Evidence* (13th Ed) at p 98 states:

> There is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing the persons who are able to identify the criminal a photograph or series of photographs to see if they can pick out any one of them who resembles the person whom they think they will be able to identify. What is objectionable is, if a witness has identified an accused person, for the police to try and corroborate the evidence of that witness by showing him or her photograph of the actual person whom they have already identified.

Encik Wan Majid, counsel for the first appellant, submitted that the learned president had wrongly admitted the cautioned statement made by the first appellant. The cautioned statement was admitted after a trial within a trial was held. The learned president, when admitting the cautioned statement said:

> I'm satisfied that there has been only an omission of the three words, namely 'atau menjawab apa-apa' during the writing of the caution by the recording officer and that the caution was properly administered.
>
> I'm also satisfied that the inducement made by one of the interrogating officers, as claimed by the third accused, was insufficient to lead him to suppose that he would gain an advantage of a temporal nature.
>
> As such, I admit the cautioned statement.

I have considered the evidence adduced during the trial within a trial and I have no reason to disagree with the

decision of the learned president. I have gone through the notes of evidence and the grounds of judgment of the learned president and after hearing the submissions of counsel for the appellants and the reply by the learned DPP, I dismissed the appeal of the three appellants against conviction.

On the question of sentence, the learned DPP submitted that the order of ten strokes of light rotan made by the learned president against the first appellant was not a proper order. She referred to the probation report of the first appellant which states that the age of the first appellant at the time the offences of rape and robbery were committed, was 17 years 11 months. According to her, under s 288(iv) light rotan was only inflicted on youthful offenders. Under s 2, a 'youthful offender' is defined as a child convicted of an offence punishable by fine or imprisonment who is above the age of ten and under the age of 16 years. The learned DPP asked the court to exercise its power of revision under s 325 read with s 316 of the CPC to alter the nature of whipping to that of whipping for adults.

Mr Gunaseelan, counsel for the first appellant, submitted that there was no direct evidence to prove that the first appellant was not a youthful offender. He referred to the particulars written on the charge sheet where the appellant's age is 17 years 11 months. He also referred to the evidence of the appellant during the trial where he said his age was 18 years. Mr Gunaseelan said that there was no direct evidence to show that the first appellant was not a youthful offender. He added that the evidence given by the first appellant of his age was inadmissible. He urged the court not to alter the order of light rotan but to release him forthwith since he had already served four years eight months in prison.

In my opinion, the age of the first appellant can be determined from the charge sheet and his probation report. See s 114(e) of the Evidence Act 1950. The probation report was admitted as an exhibit and it was not challenged by the first appellant. Since the first appellant was an adult at the time the offences were committed, under s 173(m)(2) the sentence passed against him must be according to law. Therefore I exercise my power under s 325 read with s 316 of the CPC, and order that the order of light rotan be substituted with whipping inflicted against adult offenders.

The sentence against the first appellant is therefore ten years' imprisonment with effect from the date of arrest and ten strokes of whipping in respect of the offence of rape and eight years' imprisonment with effect from the date of arrest and four strokes of whipping in respect of the offence of robbery.

In my opinion the above sentence and the sentences passed by the learned president against the second and third appellants are not manifestly excessive, taking into consideration all the circumstances in the present case.

The offence of rape is rampant in this country. The court will be failing in its duty if it does not impose a deterrent sentence in this case. The punishment must not only deter the appellants from committing a similar offence in the future but it must also deter others from committing such an offence. The punishment inflicted for grave offences including the crime of rape should adequately reflect the revulsion felt by the great majority of society. See JC Smith & B Hogan *Criminal Law* (5th Ed) at p 6.

In this case therefore the punishment has to be sufficiently harsh and proportionate to the harm done, otherwise society will feel that the punishment is manifestly inadequate. The punishment must also reflect public disapproval of the crime committed by the appellants. See *R* v *Roberts*[2] at p 610.

Similarly, the punishment for the robbery offence must also be deterrent in nature. The appellants are no doubt first offenders but as they have been convicted of a serious crime involving violence, the primary consideration of the court is the element of public interest and society's abhorrence of this type of crime. See *Goh Chung Wee* v *PP*.[3]

For the reasons stated above I dismiss the appeal against sentence by all the three appellants. As already stated, the order for light rotan against the first appellant is substituted with an order for whipping for adults.

Appeals dismissed.

Solicitors: *AJ Ariffin Chong & Harpal; Wan Majid & Mano.*

Reported by *Mathavan Devadas*